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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)
MOBILEMEDIA CORPORATION, et al.) WT DOCKET NO. 97-115
)
Applicant for Authorizations and Licensee)
of Certain Stations In Various Services)

To: The Commission

**COMMENTS ON MOTION FOR WAIVER AND
APPLICATION FOR REVIEW**

1. On May 13, 1997, MobileMedia Corporation (MobileMedia) filed a "Motion for Waiver and Application for Review." The Acting Chief, Wireless Telecommunications Bureau, by his attorneys, submits the following comments.¹

2. On April 23, 1997, MobileMedia filed an "Emergency Motion for Special Relief and Stay of Proceedings Regarding MobileMedia Corporation" (Emergency Motion). MobileMedia asked the Presiding Judge to make an immediate finding that relief under Second Thursday Corp., 22 FCC 2d 515 (1970), is available to MobileMedia, and it requested a ten month stay of the proceeding to give it an opportunity to develop and file a plan to assign or transfer its licenses that would be consistent with Second Thursday. MobileMedia recognized that, unlike most licensees seeking Second Thursday relief, it was not in a position

¹ To the extent the Commission deems it necessary, the Bureau hereby requests a waiver of the five page limitation on responsive pleadings set forth in Section 1.301(c)(7) of the Commission's Rules.

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to immediately file assignment applications. It cited its status as a publicly trade company "in the midst of a complex reorganization involving a substantial web of creditor relationships" as justification for staying the proceeding and giving it time to develop a plan for Second Thursday relief. Emergency Motion, p. 2. MobileMedia represented that "any plan of reorganization will satisfy all of the components of the Second Thursday doctrine." Id. at 8. Specifically, it represented that any plan of reorganization would necessarily involve a transfer of control to new equity holders, who will select their own directors, who would in turn appoint officers and senior management. Id. at 10. It committed that any person charged with wrongdoing when its reorganization plan is confirmed "will not be involved with the Company from that time forward." Id. MobileMedia emphasized that a grant of its request would serve the public interest by protecting innocent creditors and MobileMedia's customers and avoid frustrating the core purposes of bankruptcy law.

3. The Bureau filed comments on April 29, 1997 supporting MobileMedia's request in principle. The Bureau stated that the policy considerations underlying Second Thursday applied with equal force to a publicly traded non-broadcast licensee, and that MobileMedia appeared to meet the threshold criteria for Second Thursday relief. The Bureau submitted that MobileMedia's request for relief was warranted so long as certain requirements were imposed.

4. The Presiding Judge denied MobileMedia's motion. Memorandum Opinion and Order, FCC 97M-80 (released May 7, 1997). The Presiding Judge recognized that there was no precedent deciding the issue of whether Second Thursday relief could be available to

publicly traded licensees. Id. at ¶ 9. He then held that a publicly traded corporation could not be eligible for Second Thursday relief because wrongdoers that held stock could not be prevented from receiving "unavoidable financial enrichment." The "unavoidable financial enrichment" was an increase in MobileMedia's stock price that would allegedly occur if the Commission granted MobileMedia relief. Id. at ¶ 10. A second reason the Presiding Judge gave for denying MobileMedia relief was that it was not possible to identify the wrongdoers who would be barred from receiving improper benefits. The Presiding Judge cited language in the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124 (released April 8, 1997) (HDO) that it was not known which officers, directors, or senior managers knew about or condoned the misconduct. The Presiding Judge held that the hearing was the proper forum for identifying the wrongdoers. Id. at ¶ 11.

5. The Presiding Judge denied MobileMedia leave to appeal his interlocutory appeal. Memorandum Opinion and Order, FCC 97M-83 (released May 13, 1997). MobileMedia has now filed an appeal of the Presiding Judge's ruling. The Bureau submits that: (a) the Commission should consider MobileMedia's appeal on the merits; (b) the Presiding Judge should have referred MobileMedia's motion to the Commission in the first instance because the question of whether Second Thursday relief is available to publicly traded non-broadcast licensees is an important policy issue of first impression; (c) the time for considering whether MobileMedia can show compliance with the Second Thursday criteria, is, in the circumstances

of this case, when MobileMedia makes a full Second Thursday showing; and (d) MobileMedia's request for relief should be granted, subject to certain terms and conditions.

The Commission should consider MobileMedia's Appeal on the Merits.

6. Pursuant to Section 1.301(b) of the Commission's Rules, the Presiding Judge's denial of MobileMedia's request for permission to file an appeal with the Commission is final. Consequently, under ordinary circumstances, MobileMedia's instant pleading would be subject to dismissal as procedurally defective. Notwithstanding Section 1.301(b), the Commission has entertained what would otherwise constitute an unauthorized interlocutory appeal when "the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." Communications Satellite Corp., 32 FCC 2d 533, 535 (1971) (Comsat). The Bureau agrees with MobileMedia that the Company's instant request for relief should be considered under the rationale expressed in Comsat. MobileMedia has placed before the Commission the issue of whether relief under Second Thursday is available to a publicly traded non-broadcast licensee. This matter is not only one of first impression, but also raises an important question of public policy. Furthermore, a ruling by the Commission on this matter would have a profound and immediate impact on the disposition of this proceeding. Consequently, the Bureau believes that the Commission should consider MobileMedia's instant appeal -- as well as the Bureau's Comments -- on the merits.

MobileMedia's Appeal Raised New and Novel Issues of Law That Should Be Considered by the Commission.

7. The Presiding Judge recognized that there was no precedent determining whether Second Thursday relief is available to publicly traded non-broadcast licensees. Memorandum Opinion and Order, FCC 97M-80, supra, at ¶ 9. Nonetheless, he then ruled as a matter of law that such licensees were not available to publicly traded licensees. The Bureau believes that once the Presiding Judge recognized that the issue was new and novel, it was incumbent on him to certify the issue to the Commission. The Commission reserved the right to rule in the first instance on the appropriate disposition of this proceeding. HDO, ¶ 13. Since the grant of Second Thursday relief to MobileMedia would be a disposition of the proceeding, the Commission should have had the opportunity in the first instance to rule on the availability of that disposition. Furthermore, the question of the availability of Second Thursday relief to publicly traded non-broadcast licensees is a new, novel, and important question that is properly left for the Commission to decide.

8. The Commission has historically applied the Second Thursday doctrine in recognition of the public's interest in protecting innocent creditors and to strike a balance between the sometimes conflicting policies of federal bankruptcy law and the Communications Act. The Bureau submits that the Commission's interest in harmonizing the Communications Act with federal bankruptcy law is as compelling with a publicly traded non-broadcast licensee as it is with a privately held broadcast licensee. Indeed, in the instant case, the sheer

number of innocent creditors who are involved and the enormous amount of debt at stake² suggest that application of the Second Thursday doctrine may be more compelling in the case of MobileMedia than in the case of a typical privately held entity. Furthermore, in considering whether to grant Second Thursday relief, the Commission must in every case balance "the possible injury to regulatory authority that might flow from wrongdoers' realization of benefit against the public interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party." LaRose v. FCC, 494 F.2d 1145, 1149 (D.C. Cir. 1974). The Commission has never suggested that this test should be applied any differently to a publicly traded licensee than it would to a privately held entity. Under these circumstances, the Bureau submits that Second Thursday relief should be available to publicly traded non-broadcast licensees in general.

The Presiding Judge Erred In Considering At This Time Whether Wrongdoers
Have Been or Can Be Identified

9. The Presiding Judge denied MobileMedia's request for a stay because "MobileMedia has not shown that there is a mechanism available to prevent wrongdoers holding stock from enriching themselves from the sale of their publicly traded stock at an increased price." Memorandum Opinion and Order, FCC 97M-83, supra at ¶ 3. In determining that MobileMedia's motion must be denied because wrongdoers could not be

² It is the Bureau's understanding that approximately 40 financial institutions constitute the class of secured creditors to whom MobileMedia owes in excess of \$800 million. There also are several thousand unsecured creditors -- including institutional investors, pension funds, mutual funds, and life insurance companies -- to whom MobileMedia owes an estimated \$500 million.

identified, the Presiding Judge failed to recognize the unusual nature of MobileMedia's request for procedural relief. In a typical Second Thursday case, the licensee requests Second Thursday relief at the same time it files its underlying transfer or assignment application. Here, MobileMedia requests a ruling that Second Thursday relief is available well in advance of filing its Second Thursday assignment or transfer applications. Its justification for that request is its status as a publicly traded company and the complexity of the bankruptcy proceeding. The unusual nature of its request for relief is another reason for the Commission to consider this matter.

10. If the Commission finds, as a matter of law, that Second Thursday relief is available to MobileMedia, it will be absolutely incumbent upon the Company to satisfy all requirements of the Second Thursday doctrine at the time it submits its applications and supporting materials.³ Whether the Commission can grant MobileMedia the Second Thursday relief it ultimately seeks can best be answered in the context of a specific proposed transaction. Without a specific pending transaction to analyze, however, rejection of Second Thursday relief would appear to be premature.

11. In sum, the Bureau believes that MobileMedia need not make its showing of compliance with the Second Thursday doctrine at this time. However, the Bureau also recognizes that this case is one of first impression under the Second Thursday doctrine. Thus,

³ Failure to submit a Second Thursday showing that fully and completely satisfies all requirements of the doctrine to the satisfaction of the Commission (or the entity to whom the Commission has delegated authority over the filings) would result in the denial or dismissal of the applications and the return of this case to active hearing status.

to the extent that the Commission shares the Presiding Judge's belief that a showing is now warranted to establish that Second Thursday relief can be effectuated in the case of a publicly traded corporation, the Commission may consider requiring MobileMedia to make a proffer as to available mechanisms for preventing suspected wrongdoers in publicly traded corporations from being unjustly enriched under the Second Thursday doctrine.

MobileMedia's Appeal Should Be Granted.

12. The Bureau believes that, on balance, a suspension of the hearing in this proceeding is warranted to allow MobileMedia sufficient time to arrange and effectuate a Second Thursday remedy. It appears that MobileMedia is within the traditional class of licensees to whom Second Thursday relief has been granted. For instance, there are basic qualifying issues pending against MobileMedia; the Company has filed for protection under Chapter XI of the U.S. Bankruptcy Code; and, a significant number of innocent creditors stand to lose substantial sums of money if the Commission issues an adverse decision. There is a risk of harm to MobileMedia's creditors and subscribers if the proceeding is not suspended. The Bureau believes that MobileMedia should have the opportunity to demonstrate that Second Thursday relief would serve the public interest.

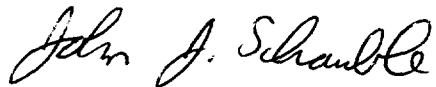
13. However, the Bureau submits that the Commission should impose particular terms and conditions on any suspension that it may grant. For example, any suspension should be for a finite period of time with explicit notice that extensions will not be entertained absent compelling reasons. MobileMedia, at p. 1 of its Emergency Motion, requests a stay of 10

months duration, but concedes, at p. 6, that this is a "minimum" requirement. MobileMedia should be required to specifically articulate (a) the procedural and substantive requirements under federal bankruptcy law with applicable statutory deadlines, and (b) the Company's justification for seeking time beyond those applicable statutory deadlines. With such information, the Commission may determine an appropriate duration for the suspension. In addition, MobileMedia should be required to file monthly written progress reports, rather than the quarterly reports it has proposed.

14. In conclusion, the Bureau supports consideration of MobileMedia's motion on the merits, and the grant of a limited suspension of this proceeding with the terms and conditions

described above in order to afford MobileMedia a reasonable amount of time to prepare a Second Thursday request for relief.⁴

Respectfully submitted,
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⁴ If a stay is granted, the Bureau requests that the Commission delegate to it authority to evaluate and process applications seeking relief under Second Thursday. The Commission retained authority to evaluate proposed Second Thursday applications until 1993. However, in New South Broadcasting, Inc., 8 FCC Rcd 1272 (1993), the Commission found that "the evolving nature of the Second Thursday policy has established a sufficient body of precedent to enable the staff to facilitate the processing of petitions and the resolution of hearing proceedings." Id. at ¶ 6. The Mass Media Bureau was granted limited authority "to process those petitions that are consistent with established Commission policy and do not involve novel questions of fact, law or policy." Id. The Wireless Telecommunications Bureau acknowledges that the instant case is a case of first impression concerning the application of Second Thursday to a publicly traded, non-broadcast licensee. The Bureau leaves to the Commission the novel issue of whether to interpret Second Thursday to include a large, publicly traded non-broadcast licensee operated by a debtor-in-possession. The Bureau seeks only the remaining authority, in this instance, to process any Second Thursday applications that MobileMedia may proffer.

CERTIFICATE OF SERVICE

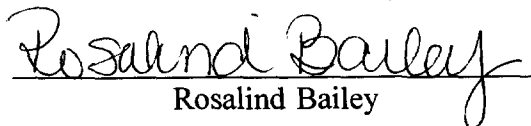
I, Rosalind Bailey, a secretary in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 19th day of May 1997, sent by first class mail, copies of the foregoing, "Comments on Motion for Waiver and Application for Review" to:

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